No. 82-1002

In The

Supreme Court of the United States

October Term, 1982

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

CARNATION COMPANY,

Petitioner,

vs.

STATE DIVISION OF HUMAN RIGHTS on the Complaint of DARYL CLARKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT DARYL CLARKE IN OPPOSITION

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Questions Presented

1. Whether this Court has jurisdiction over the instant petition, because the challenge to the constitutionality of §296.10 of the New York Executive Law and the federal labor law and due process issues alleged in the petition were not presented to the New York courts.

2. Whether the requirement of New York Law that an employer which claims that it cannot reasonably accommodate the religious preferences of an employee without undue economic hardship must submit evidence sufficient to demonstrate such hardship violates the Establishment Clause of the First Amendment of the United States Constitution.

3. Whether the decision by the Commissioner of the New York State Division of Human Rights that the collective bargaining agreement would permit the employer to accommodate the religious preferences of an employee implicates principles of federal labor law.

4. Whether review by the state court to determine whether the agency's findings were supported by substantial evidence in the record of the public hearing accorded the petitioner due process of law.

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BRIEF FOR RESPONDENT DARYL CLARKE IN OPPOSITION

STATEMENT OF THE CASE

This petition arises from a dispute between complainant, Daryl Clarke ("Clarke"), and petitioner, Carnation Company ("Carnation") over Clarke's request that Carnation accommodate his observance of his Sabbath in accordance with the tenets of the Seventh Day Adventist Church. At the time of his baptism into that faith on September 25, 1971, Clarke was employed by Carnation at its South Dayton, New York plant as a labeler operator, classified as a Bracket I position. After his conversion, Clarke informed his supervisors that he would no longer work from sundown on

Friday through sundown on Saturday, his Sabbath, but that he would be available to work on Sundays. Carnation produces and cans evaporated milk at the South Dayton plant, and operates the facility on a 7-day per week basis. Maintenance is performed on Wednesdays and Sundays, with production taking place on the remaining days.

Carnation's South Dayton production and maintenance employees, including the labeler operator and warehouseman positions, are represented by the Truck Drivers and Helpers Union Local No. 649 (the "Union"), which has entered into a series of collective bargaining agreements with Carnation. Since 1970, those agreements have contained the following language: "So far as possible, relief days shall be rotated." That rotation, including Saturdays, is accomplished according to the employee's shift in a given week, and is not dependent upon nor related to seniority. It applies to all positions at the plant.

Since 1971, Carnation has had three labeler operators at the plant. It projects the number of hours that each will work a full year in advance, and variations in those projections rarely occur. Carnation may use "relief men" and others to replace labeler operators, so long as those individuals are qualified for the position, which requires approximately two to three weeks of training.

Immediately after Clarke informed Carnation that he would no longer work on his Sabbath, the other two labeler operators "covered" for him on a temporary basis, working those Saturdays on which Clarke was scheduled to work. In November 1971, Frank Wilson, a co-employee, filed a grievance, complaining that he was denied a scheduled Saturday off, because Clarke was not available to substitute for him in accordance with Carnation's customary practice. The grievance was resolved by arranging for another employee to substitute for Wilson, with no determination made

as to whether the practice of accommodating Clarke's religious preference violated the collective bargaining agreement. No other grievances have been filed challenging that practice.

Clarke thereafter arranged with the other labeler operators to substitute for him on a permanent basis. That practice continued until July 1973, when they informed Clarke that they would no longer work in place of him on Saturdays. As a result of that determination by his co-workers, Carnation described to Clarke three alternatives by which he could observe his Sabbath. First, he could be assigned a Bracket III general labor position, with a reduction in pay. Second, he could terminate his employment with Carnation. Third, Carnation could create a fourth labeler operator position for Saturdays only, but it also informed Clarke that it would not agree to that purported alternative.

Carnation did not describe any alternative under which an employee with a lower job classification could be substituted for Clarke on Saturdays. Nor did Carnation describe an alternative which would utilize those employees already denominated as "relief operators" to accommodate Clarke. Pursuant to its collective bargaining agreement with the Union, Carnation could have substituted a lower classified employee without the need to reclassify the substituting employee to the higher paid job. The agreement provides that "if an employee spends over fifty percent (50%) of his time on a higher rated job for thirty (30) consecutive scheduled work days, except for relief due to vacations, sickness or injury, he shall be reclassified to the rate schedule of the higher rated job." Indeed, Carnation has used lower-grade employees to substitute for Bracket II — Warehouseman without reclassifying the substituting workers, and has used relief operators to substitute for Bracket I — Labeler Operators as well as other Bracket I positions, without

claiming that these practices violate the collective bargaining agreement.

After presenting the three alternatives to Clarke, Carnation did not approach either the Union or Clarke's co-employees concerning alternative ways of allowing him to observe his Sabbath. It did not offer him an alternative whereby he could remain in the position of labeler operator, or in any other Bracket I position, and observe his Sabbath.[1]

Clarke declined the two remaining alternatives offered by Carnation, and was thereafter scheduled to work on Saturday, July 7, 1973. In accordance with the tenets of his religion, he did not report to work on that day. Carnation responded with a letter notifying him that he would face disciplinary action, including termination, if he did not "report to work as scheduled unless a reasonable excuse was given to [his] supervisor in advance of [his] absence."

Carnation again scheduled Clarke to work as a labeler operator on Saturday, August 4, 1973. He advised Carnation that he would not report to work on that day, because it was his Sabbath. Carnation, not considering Sabbath observance to be a reasonable excuse for absence, disciplined Clarke by demoting him to a Bracket III — General Labeler Position, with a $.50 per hour reduction in pay. Clarke accepted that position, under protest, to avoid discharge.

Clarke remained in the general laborer position until September 15, 1976, at which time he bid for, and was placed in, the position of Bracket II — Warehouseman. In that position, he earned $.25 per hour less than he would have earned as a labeler operator. The warehouseman

[1]After completion of the proceeding before the Division, Carnation, in February 1980, placed Clarke in another Bracket I position, which was also in existence in 1973, and has not required him to work on his Sabbath in that position.

position is scheduled for days off in accordance with the same rotation schedule as labeler operators, but Clarke has not been required to work on Saturdays as a warehouseman. Rather, Carnation has substituted other persons to work in his place on those days. No grievance concerning this action has ever been filed, nor has Carnation ever contended that this practice violates the collective bargaining agreement.

In September 1977, Clarke was the most senior employee to bid for a vacant labeler operator position. Carnation offered him the position on the condition that he would work on Saturdays when scheduled. He refused, and was therefore denied the position. For at least three months in 1978, Carnation operated the plant with only two of the three labeler operator positions filled. During that time, the two remaining labeler operators worked in accordance with the normal rotation schedule at the plant, and Carnation used "relief operators" to work in their place on Saturdays. No employee filed a grievance challenging that practice.

Clarke filed the discrimination complaint which is the subject of this petition on October 16, 1973. In an appeal from an initial determination by the New York State Division of Human Rights (the "Division"), the New York Court of Appeals directed that a public hearing be held to determine whether reasonable accommodation of Clarke would cause Carnation undue economic hardship. The decision, based upon the court's interpretation of §296.10 of the New York Executive Law, ordered the hearing to determine whether that accommodation would cause "a palpable increase in costs or risk to industrial peace. . . ." *State Division of Human Rights v. Carnation Co.*, 42 N.Y.2d 873, 875 (1977).

Based upon the evidence adduced at the hearing, the Commissioner of the Division concluded that Carnation had violated §296.10 of the New York Executive Law by requiring Clarke to accept a demotion because he refused to

work on his Sabbath. The Commissioner specifically found that Carnation had failed to present evidence to substantiate its claim that accommodation of Clarke would cause it to incur increased costs. Also, the Commissioner determined that the accommodation of Clarke would not cause Carnation to violate the collective bargaining agreement with the Union, or present a risk to industrial peace. The Human Rights Appeals Board affirmed the Commissioner's decision in an order dated February 18, 1981.

Thereafter, the Division petitioned the Appellate Division of the New York Supreme Court, Fourth Judicial Department to enforce the Commissioner's order. Carnation filed a cross-petition to annul and vacate the order. Specifically, Carnation sought to challenge the factual determination that it had failed to make reasonable efforts to accommodate Clarke. It also urged that the Commissioner's decision was not supported by substantial evidence, the very standard which it seeks to challenge through this petition. Third, it argued that the Commissioner had not complied with the standard set forth by the Court of Appeals in its prior decision in this case. Finally, it argued that it had suffered undue prejudice as a result of administrative delays in the proceedings, and that the Commissioner's order should therefore be vacated.

Carnation did not argue in the Appellate Division that §296.10 of the Executive Law, as interpreted by the Division, violated the Establishment Clause of the First Amendment of the United States Constitution. Nor did it argue that the Commissioner's decision violated any policies of federal labor law. In essence, Carnation's argument in the Appellate Division was a factual one, challenging the conclusions of the Commissioner and the Division.

On February 26, 1982, the Appellate Division unanimously sustained the Commissioner's order, and dismissed Carnation's cross-petition. Carnation sought leave to appeal to the New York Court of Appeals first from the Appellate Division and then from the Court of Appeals. The Appellate Division denied the application on May 14, 1982. The Court of Appeals denied leave to appeal on September 16, 1982.

In its application to the Court of Appeals, Carnation presented arguments concerning its efforts to accommodate Clarke and the applicability of standards established by the New York Court of Appeals to determine undue economic hardship. It also questioned the sufficiency of the evidence to support the Commissioner's decision, and the appropriateness of the remedy of reinstatement. Finally, it raised again the argument that it had been prejudiced through the alleged administrative delay. Significantly, Carnation presented none of the federal constitutional or labor law questions raised in this petition, and did not even cite this Court's decision in *Trans World Airlines, Inc. v. Hardison,* 423 U.S. 63 (1977), upon which it relies so heavily here.

REASONS FOR DENYING THE WRIT

POINT I

THIS COURT LACKS JURISDICTION OVER THE INSTANT PETITION BECAUSE THE ISSUES RAISED THEREIN WERE NEITHER PRESENTED TO, NOR CONSIDERED BY, THE NEW YORK COURT OF APPEALS OR THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT.

It is fundamental that, in cases involving applications for writ of certiorari, this Court has jurisdiction over only those issues which have been presented to the highest state court. *Webb v. Webb,* 451 U.S. 493 (1981); *Tacon v. Arizona,* 410 U.S. 351 (1973); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). Section 1257(3) of Title 28 of the United States Code confers jurisdiction over those questions which have been "specially setup or claimed . . ." under federal law in the state courts. The petitioner has the burden to show that they were presented to that court, and it must demonstrate, expressly or through clear implication in the record, that the federal questions were presented below. If they were not, this Court has no jurisdiction. *Webb v. Webb, supra; Carter v. Kentucky,* 450 U.S. 288 (1981).

The issues contained in the instant petition were not presented to the New York courts. The establishment of religion argument was not raised in any of the briefs or other papers submitted by Carnation. Nor was the federal labor law policy issue presented. The only due process argument made by Carnation was based upon alleged administrative delay in reviewing and processing the complaint. Indeed, in the Appellate Division, Carnation claimed that the issue was whether substantial evidence supported the Commissioner's findings, not whether the use of that standard denied it due process.

Perhaps the most telling indication that Carnation did not raise these issues below is its reliance here upon this Court's decision in *Trans World Airlines, Inc. v. Hardison, supra.* That case is not cited at all in Carnation's brief in support of its motion for leave to appeal to the Court of Appeals. Carnation cited it to the Appellate Division only in support of the proposition that a collective bargaining agreement provision with respect to the assignment of weekend work may be a fair and equitable way to distribute the workload among employees, and thus evidence of lack of discriminatory intent.

Because Carnation did not raise the federal issues below, the New York courts have not had the opportunity to pass upon them. As stated in *Cardinale v. Louisiana, supra* at 438, "it was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." There are sound reasons that such review in the first instance should be denied. First, because the issues have not been raised below, the record concerning them will most likely be inadequate. Second, it is a recognized principle of federalism that state courts should have the first opportunity to pass on the constitutionality of state statutes. *Id.* at 439.

Because Carnation failed to raise the questions of federal law below, the petition should be dismissed for lack of jurisdiction.

POINT II

THE DETERMINATION THAT CARNATION VIOLATED §296.10 OF THE NEW YORK EXECUTIVE LAW, BASED UPON THE FINDING THAT IT DID NOT PRESENT EVIDENCE SUFFICIENT TO DEMONSTRATE UNDUE ECONOMIC HARDSHIP, DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION.

A. *The New York Court Applied The Proper Standard To Determine Whether A Reasonable Accommodation Of Clarke's Religious Beliefs Would Cause Undue Economic Hardship To Carnation.*

The New York Court of Appeals in *State Division of Human Rights v. Carnation Co., supra,* set forth the appropriate standard to determine whether the accommodation of Clarke's beliefs would cause undue economic hardship to Carnation. It directed the Division to hold a hearing to determine whether the accommodation would cause "a palpable increase in costs or risk to industrial peace . . ." *Id.* at 875. Upon review of the evidence, the Commissioner determined that Carnation had failed to meet that standard.

With respect to the cost issue, the Commissioner concluded that, based upon the collective bargaining agreement and past practice under it, Carnation could arrange for a lower-grade employee to substitute for Clarke without the need to reclassify that employee. Moreover, Carnation presented no actual cost data with respect to the alternative methods of permitting Clarke to observe his Sabbath. With respect to the issue of industrial peace, the Commissioner found that, with the exception of one grievance which was resolved before a final determination was made, there had been no other complaints filed concerning Carnation's method of accommodating Clarke. The Commissioner properly concluded that mere speculation was insufficient to demonstrate a real

risk to industrial peace. The Commissioner's findings were affirmed and accepted by the Division's Appeal Board and the Appellate Division of the New York Supreme Court. The New York Court of Appeals declined to review them.

In *Trans World Airlines, Inc. v. Hardison, supra,* this Court reviewed the standard to determine reasonable accommodation and undue hardship under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), which contains a prohibition of religious discrimination similar to that in §296.10 of the Executive Law. In that case, the District Court, finding that accommodation of the employee would result in increased costs and would require the employer to violate the seniority provisions of a collective bargaining agreement, ruled for the employer. The Eighth Circuit reversed. This Court in turn reversed, holding that it would cause undue hardship to require the employer to incur substantial additional costs or to violate the collective bargaining agreement in order to accommodate the religious preferences of an employee.

Here the Commissioner has determined that Carnation failed to prove either prong of that test. Accommodation of Clarke will not result in increased costs, nor will it require Carnation to violate the collective bargaining agreement with the Union.[2]

The arguments in Carnation's petition are no more than challenges to those factual determinations. The issues which it purports to raise under *Hardison* would require this Court to assume facts which Carnation failed to prove. Carnation claims that it demonstrated increased costs, risks to industrial peace, and constraints of the collective bargaining agreement.

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[2]Carnation's claim that the Wilson grievance shows that the accommodation would violate the agreement is unfounded. That grievance was settled without any determination interpreting the collective bargaining agreement.

Assuming that unproved economic hardship, it argues that the Appellate Division, in an interpretation of the statute which constitutes the establishment of religion, required it to accommodate Clarke.

That was not the holding of the state court. The Appellate Division affirmed the Commissioner's determination that Carnation had failed to submit evidence sufficient to establish economic hardship. The holding does not preclude an employer from alleging and proving the existence of undue economic hardship. Carnation's failure to meet its burden of proof does not present an issue requiring review by this Court.

B. ***Section 296.10 Of The New York Executive Law Does Not Violate The Establishment Clause Of The First Amendment Of The United States Constitution.***

In *Committee for Public Education and Religious Liberty v. Nyquist, Commissioner of Education of New York*, 413 U.S. 756 (1973), this Court set forth the standard to determine whether a state statute violates the Establishment Clause of the First Amendment to the United States Constitution. To pass constitutional muster, the statute must serve a clearly secular legislative purpose. Second, its primary effect must be neither to advance nor inhibit religion. Third, it must avoid excessive government entanglement with religion.

The provision of the New York Executive Law at issue here, which prohibits employers from discriminating against employees on the basis of Sabbath observance unless the accommodation of those religious beliefs would cause undue economic hardship to the employer, meets the test. The statute has the clearly secular purpose of eliminating discrimination in employment practices. Its effect is neither

to advance nor inhibit religion because it applies neutrally to all religions. Finally, there is no excessive government entanglement with religion because the statute is designed to operate with no government involvement unless an employer discriminates wrongfully.

Carnation has not demonstrated that the statute in question violates any element of that test. That failure is readily explained because Carnation's real dispute is with the Commissioner's factual findings, not with the standards to interpret the statute. Carnation's failure to prove undue economic hardship, and its challenge to that finding, do not present constitutional issues requiring this Court's review.

POINT III

BECAUSE CARNATION CAN ACCOMMODATE CLARKE'S RELIGIOUS BELIEFS WITHOUT VIOLATING THE COLLECTIVE BARGAINING AGREEMENT, THE INSTANT PETITION RAISES NO QUESTIONS INVOLVING FEDERAL LABOR LAW POLICIES.

In another attempt to create a federal question from a purely factual issue, Carnation argues that the Commissioner's decision violates a federal labor law policy favoring the validity of collective bargaining agreements. The Commissioner determined, however, that Carnation could accommodate Clarke without violating the collective bargaining agreement. Indeed, the evidence demonstrates that Carnation has accommodated Clarke as a warehouseman without violating the agreement. Carnation has used replacement workers when there were only two labeler operators, also without violating the agreement. The clause permitting the use of substitute workers of a lower grade so long as they do not work in the higher paid job classification more than 50% of their time in any given 30-day period provides Carnation with yet another vehicle to accommodate Clarke.

The only grievance based upon the accommodation of Clarke was settled, without any determination that the practice violated the agreement nor that the Union concurred in the filing of the grievance by Frank Wilson. No other grievance had been filed with respect to any other aspects of the accommodation, or possible accommodations. Carnation can hardly rely upon its own resolution of a grievance to conclude that the practice necessarily violates the collective bargaining agreement.

Carnation's argument suffers again from misplaced reliance upon this Court's decision in *Hardison*. Accommodation of the employee in that case would have required violation of the seniority clause of the collective bargaining agreement, but the section of the Civil Rights Act at issue there carves out an exception to the accommodation requirements for bona fide seniority clauses. 42 U.S.C. §2000e-2(h). While recognizing that neither a collective bargaining agreement, nor a seniority system contained in it, could be used to violate the statute, this Court held simply that an employer could not be required to accommodate an employee in a manner "inconsistent with [an] otherwise valid agreement." 432 U.S. at 79.

Seniority was not an issue in this case. No clause of the collective bargaining agreement would prohibit Carnation's accommodation of Clarke, and §296.10 of the Executive Law creates no special exceptions applicable to Carnation. To allow Carnation not to accommodate Clarke would permit the agreement to be used to violate the statute. The decision in *Hardison* certainly does not condone that result.

In sum, the evidence is overwhelming that Carnation can accommodate Clarke consistent with its agreement with the Union. It is only by assuming otherwise that Carnation can argue that the accommodation would violate the standard set forth in *Hardison*. Carnation's disagreement with the facts

found by the Commissioner should, however, be of no avail before this Court. The Commissioner's decision does not threaten the collective bargaining agreement, and, accordingly, has no implications for federal labor law policies. Carnation's dispute is essentially factual, and does not warrant review by this Court.

POINT IV

THE APPELLATE DIVISION'S REVIEW OF THE COMMISSIONER'S DECISION UNDER A SUBSTANTIAL EVIDENCE STANDARD DID NOT DENY THE PETITIONER DUE PROCESS OF LAW.

The New York Court of Appeals determined that Carnation must accommodate Clarke unless to do so would inflict undue hardship upon it, and ordered a hearing to determine whether Carnation could demonstrate such hardship. *State Division of Human Rights v. Carnation Co., supra.* The Commissioner found that Carnation had failed to prove hardship, and that decision was affirmed by the Division's Appeal Board and by the Appellate Division, applying a substantial evidence test. Carnation now argues that that standard of review denies it due process of law.

It is well established under New York law that the Commissioner's decisions must be upheld if they are supported by substantial evidence. *State Division of Human Rights v. Bystricky,* 30 N.Y.2d 322 (1972). In reviewing the Commissioner's decision, the Court is free to review the entire record to determine if there is substantial evidence. *300 Gramatan Avenue Associates v. State Division of Human Rights,* 45 N.Y.2d 176 (1978). It did so here. Indeed, §298 of the New York Executive Law dictates that if findings of fact are supported by sufficient evidence on the record considered as a whole, those facts are deemed to be conclusive, and the Commissioner's order cannot be disturbed. N.Y. Exec. Law §298 (McKinney 1982).

Carnation apparently urges that this Court should weigh the evidence, or substitute its own judgment for that of the Commissioner where the evidence is contradictory. Such a standard is not permissible. *State Division of Human Rights v. Columbia University,* 39 N.Y.2d 612, 616 (1976), *cert. denied sub nom. Gilinsky v. Columbia University,* 429 U.S. 1096 (1977). The courts are not permitted to reverse the Commissioner's decision merely because the record might support a conclusion different from that made by the Commissioner. *State Division of Human Rights v. City of Syracuse,* 57 A.D.2d 452 (4th Dep't 1977), *aff'd without opinion,* 43 N.Y.2d 958 (1978).

The substantial evidence standard is not a concept alien to this Court. In reviewing the determination of a federal agency, this Court has recognized that standard to be appropriate in appeals from determinations made after public hearings. *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971). The same standard should apply to the Commissioner's determination based upon the public hearing in this case.

A careful reading of Carnation's petition reveals that its argument arises not so much from the Appellate Division's choice of the standard of review, but from the fact that it disagrees with the Commissioner's conclusion that it did not make a reasonable effort to accommodate Clarke. The issue of whether the offering of a lower paying position to Clarke constituted a reasonable accommodation, however, was determined when this case was before the New York Court of Appeals previously. Implicit in that court's decision to remand for a determination of whether the accommodation of Clarke could be accomplished without imposing undue economic hardship on Carnation is the conclusion that Carnation's offer to demote Clarke to a lower-paying Bracket III position did not constitute reasonable ac-

commodation. Thus, that issue was decided long ago, and Carnation had the opportunity to challenge it then if it did not agree.

In sum, Carnation's argument that it has been denied due process of law raises no significant issues requiring determination by this Court. Carnation had an adequate opportunity to present whatever issues it chose to the New York court. The Appellate Division applied a well-established standard of review in passing on the Commissioner's decision. It cannot be said at this time that the review by that court violated any constitutional rights of Carnation.

CONCLUSION

Based upon the foregoing, the petition for writ of certiorari should be denied.

Dated: Rochester, New York
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